Filed 1/13/23 Boffo Cinemas v. Fireman's Fund Insurance CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BOFFO CINEMAS, LLC, Plaintiff and Appellant, v. FIREMAN'S FUND INSURANCE COMPANY, Defendant and Respondent.	D079665 (Super. Ct. No. 37-2021-00005179-CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Eddie C. Sturgeon, Judge. Reversed with directions.

Callahan & Blaine, Richard T. Collins and Sharon T. Yuen for Plaintiff and Appellant.

DLA Piper, John P. Phillips, Brett Solberg and Joseph Davison for Defendant and Respondent.

This case presents another effort by an insured to recoup business losses alleged to be related to the SARS-CoV2 virus, which causes the COVID-19 infectious disease. (See *Marina Pacific Hotel and Suites, LLC v. Fireman's Fund Insurance Company* (2022) 81 Cal.App.5th 96, 98 (*Marina*

Pacific).) In *Inns-by-the-Sea v. California Mut. Ins. Co.* (2021) 71 Cal.App.5th 688 (*Inns*), this court held a complaint did not trigger coverage under a commercial property insurance policy for lost business income due to the COVID-19 pandemic where the insured alleged that "COVID-19 strains physically infect and can stay alive on surfaces for extended periods" and that county closure orders required the insured to cease operations. (*Id*. at pp. 692, 693-694.) We held for various reasons the insured did not, and could not, allege coverage under business income and civil authority policy provisions akin to those at issue in this appeal, in part because it could not allege it had to suspend its operations by reason of a direct physical loss of or damage to property. (See *id*. at pp. 698-705, 706-708, 710-712, 713-714.)

In this case, plaintiff and appellant Boffo Cinemas, LLC (Boffo) alleges it sustained business losses from COVID-19 government shut-down orders triggering insurance coverage under various provisions and endorsements of its commercial business insurance policy issued by defendant and respondent Fireman's Fund Insurance Company (Fireman's Fund). It appeals from a judgment entered after the trial court sustained without leave to amend Fireman's Fund's demurrer to its original complaint for breach of contract, breach of the covenant of good faith and fair dealing, and declaratory relief. Observing the relevant policy provisions provide coverage for " 'direct physical loss,' " " 'damage to property' " or " 'contamination' " of the property, the court ruled Boffo's complaint lacked specific factual allegations regarding any direct physical loss, property damage or viral contamination in any of its locations, and given law holding that a direct physical loss meant " 'a distinct, demonstrable, physical alteration of the property,' " that Boffo could not amend its complaint to state a cause of action.

We agree that Boffo's complaint does not and cannot allege a scenario triggering coverage under two provisions covering business income losses and business access prevention by civil authority. However Boffo's policy contains other provisions as to which the trial court should have granted Boffo leave to amend. Accordingly, we reverse the judgment with directions that the court vacate its order sustaining Fireman's Fund's demurrer without leave to amend and enter a new order sustaining the demurrer with leave to amend.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Background and Insurance Policy Provisions

Boffo owns and operates five movie theaters containing on-site restaurants, cafes and bars in various California locations. It is insured by Fireman's Fund/Allianz under commercial business insurance policy No. S 17 MZX 80998833 (the policy), which was in effect from August 10, 2019, to August 10, 2020.

The policy contains forms and endorsements providing coverage for (1) business income and extra expense (business income coverage); (2) business access prevention, including by civil authority (civil authority coverage); (3) crisis management; and (4) event cancellation and postponement. The business income and civil authority coverages both require suspension of operations or action prohibiting access to the premises due to "direct physical loss of or damage to" Boffo's or some other property. The policy's crisis

---

1 We state the facts from the well-pleaded allegations of Boffo's complaint, and also accept and give precedence to facts appearing in attached exhibits. (*Zolly v. City of Oakland* (2022) 13 Cal.5th 780, 786; see also *Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 512; *Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505.) The insurance policy at issue is attached as Exhibit A to Boffo's complaint. It indicates that Fireman's Fund, which issued the policy, is part of Allianz Global Corporate & Specialty (Allianz).

management provision covers actual loss of "crisis event business income" due to a necessary suspension of operations "caused by or resulting from" certain events including defined premises contamination as from "communicable disease." (Some capitalization omitted.) Event cancellation coverage pays "non-refundable expenses" incurred in connection with defined "covered special event[s]" that are cancelled or postponed as a result of acts of civil authority preventing access to the premises. (Some capitalization omitted.)

In early March 2020, state and local governments began to take action in an effort to thwart the spread and impact of COVID-19, which was declared a global pandemic by the World Health Organization, leading the United States government to declare a nationwide emergency. The government actions included the issuance of state and local government orders that effectively resulted in the forced shut down of thousands of locally-owned businesses, including Boffo's properties. Such orders (the government shut-down orders) were issued by San Diego, Orange and Contra

Costa Counties, and either closed establishments with on-site dining or closed all nonessential businesses.[2]

On March 17, 2020, Boffo submitted a claim with Fireman's Fund for coverage of its losses sustained as a result of its forced closure due to the COVID-19 global pandemic and the resulting government shut-down orders. Fireman's Fund denied the claim, explaining it did not involve any direct physical loss of or damage to property, and Boffo's business was not shut down because of any covered crisis event.

---

[2] Boffo alleged that on or about March 16, 2020, the County of San Diego issued an order "mandating that '[a]ll bars, adult entertainment establishments, and other business establishments that serve alcohol and do not serve food, shall close'; that '[a]ll restaurants and other business establishments that serve food shall close all on-site dining'; and that [a]ll food served shall be by delivery, or through pickup or drive thru.' " It alleged that on or about the same day, Contra Costa County issued an order stating "that '[a]ll businesses with a facility in the County, except Essential Businesses as defined below in Section 10, are required to cease all activities at facilities located within the County . . . .' The exception in Section 10(xiii), as applied to [Boffo], is for '[r]estaurants and other facilities that prepare and serve food, but only for delivery or carry out.' Importantly, this Order was issued 'in light of the existence of 29 cases of COVD-19 [*sic*] in the County, as well as at least 258 confirmed cases and at least three deaths in the seven Bay Area jurisdictions jointly issuing this Order, as of 5 p.m. on March 15, 2020 . . . .' " Boffo alleged that on or about March 18, 2020, the Orange County Health Officer issued an order closing all bars and establishments serving alcohol but not food, closing onsite dining of restaurants and other business establishments serving food, and closing " '[a]ll movie theaters, gyms, and health clubs . . . .' " Boffo also alleged that in March 2020, the California Governor issued a stay-at-home order for all individuals living in California, except for those participating in sectors of essential critical infrastructure, and that the San Diego County public health officer likewise issued a stay-at-home order for all individuals living in the county except to provide or receive certain essential services or to engage in certain essential activities.

.

Boffo's Complaint

In February 2021, Boffo sued Fireman's Fund for breach of contract and breach of the implied covenant of good faith and fair dealing. Boffo sought a judicial declaration about the extent of coverage for its losses, and the amount of benefits to which it was entitled.[3]

In part, Boffo alleged the COVID-19 pandemic is exacerbated by the nature of the virus and the fact it is easily transmitted between individuals, with an incubation period of up to 14 days. It additionally alleged that COVID-19 "physically and directly infects and stays on the surfaces of objects or materials for up to 28 days." Boffo alleged that as a result of COVID-19 contamination and the government shut-down orders, its business was forced to completely shut down and cease operating, causing estimated losses in excess of $30 million and putting nearly 450 employees out of work.

Fireman's Fund's Demurrer

Fireman's Fund demurred to Boffo's complaint. Asking the trial court to judicially notice the government shut-down orders relied upon by Boffo, it asserted Boffo's "complaint makes clear that Boffo's claimed losses stem from state and local stay-at-home orders designed to slow the spread of COVID-19 among humans, not from any physical alteration to or permanent

---

[3] Specifically, Boffo sought a judicial declaration that "(a) the COVID-19 pandemic constitutes 'physical loss' under the policy; (b) that [its] losses are covered under each of the respective coverages discussed [in its complaint]; (c) that COVID-19 and the resulting government shut-down orders trigger coverage because the policy does not include an exclusion for losses caused by a virus or a viral pandemic; (d) that the policy provides coverage to [Boffo] for any past, current and future civil authority closures affecting [its] properties due to physical loss or damage from COVID-19; and (e) that the policy provides business income coverage to the extent that COVID-19 and the resulting government shut-down orders have caused loss or damage to [it]." (Some capitalization omitted.)

dispossession of property" and that Boffo had not alleged COVID-19 was present at any of its locations or that any of its customers or employees were infected with COVID-19 while on any insured premises. Rather, according to Fireman's Fund, Boffo alleged its theaters were closed to customers and 96 percent of its employees were laid off due to the prophylactic March 2020 shelter-in-place orders, as well as "unspecified 'contamination.' " It argued Boffo could not allege facts demonstrating that any loss was caused by direct physical loss—i.e., " 'a distinct, demonstrable, physical alteration of the property' "—or property damage for purposes of coverage under the business income, extra expense and civil authority policy provisions. Fireman's Fund argued that even if Boffo had alleged COVID-19 was present on its premises, there was an "insurmountable disconnect between the presence of COVID-19 at Boffo's properties—which can be easily cleaned with disinfecttant [*sic*]—and a distinct, demonstrable, physical alteration to any identified fixture or improvement, or a permanent dispossession of property." Fireman's Fund pointed to authorities rejecting allegations that COVID-19 on the surface of an insured's property causes physical loss or physical damage.

Opposition and Oral Argument

In opposition, Boffo criticized Fireman's Fund's coverage interpretation requiring that its properties sustain a distinct, demonstrable physical alteration so as to trigger coverage, pointing out such language was absent from its policy. Boffo argued that dispossession and loss of use, in addition to the total or partial destruction of the properties, was sufficient to trigger coverage, and that it had sufficiently pleaded such to trigger coverage under the policy's business income, extra expense and civil authority coverages. Boffo also pointed out the policy did not have a virus exclusion, warranting an expansive interpretation of coverage. It argued that a reasonable

interpretation of the policy's plain language "direct physical loss of" included the loss of the properties' use caused by COVID-19 and the government shut-down orders, and that language meant something other than "damage to" the properties. Pointing out the COVID-19 contamination did not originate with and was not confined to its properties, Boffo argued it stated a claim for coverage under the policy's civil authority and access to premises provision by alleging the presence of COVID-19 in its local communities and the government shut-down orders hindered ingress to and egress from the properties. Finally, Boffo argued the complaint stated a claim for coverage under the crisis management and event cancellation and postponement provision by allegations that its losses were caused by the presence of COVID-19 contamination in the local communities and the threat of contamination to its properties resulted in their necessary closure, which was a "covered crisis event" under the policy's crisis management provision. It argued the shut-down orders in response to the presence of COVID-19 in the surrounding communities forced it to cancel and postpone events. Boffo sought leave to amend in the event the court was inclined to sustain the demurrer to address any deficiencies the court identified.

At oral argument on the matter, Boffo's counsel emphasized that the "real point" was to seek leave to amend the complaint: "[W]e could amend to allege that there has been a physical alteration of the insured property. And that's where the science comes into play, and that's the science that has developed since this case was filed, since these cases first were filed. And we've learned a lot about this novel Coronavirus and how it acts and reacts

with property."[4] Counsel for Fireman's Fund responded in part that the complaint had already admitted that the pandemic caused purely economic harm " '[b]ecause of or due to or as a result of or due to [*sic*] the shut[-]down orders' " and thus no amendment would cure that defect. The court agreed. Though it acknowledged that it had almost always allowed amendments to an original complaint, it remarked that in this case, the policy "language is important" and it did not see how an amendment would cure it.

Boffo filed this appeal from the ensuing judgment.

DISCUSSION

I. *Standard of Review*

We apply well-settled principles. " 'In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory.' [Citation.] ' " ' "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. . . . We also consider matters which may be judicially noticed." . . . Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.' " ' " (*Mathews v. Becerra* (2019) 8 Cal.5th 756, 768; see also *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 370.) " 'The well-pled allegations that we accept as true necessarily include

---

[4] Boffo's counsel later told the court he could "offer specifics" and had brought journal articles "that talk about the amino acids on the spike proteins of the Coronavirus and its actual effect on property." Counsel said it also had "an effect on the air within the property. [¶] And all of this has been laid out now in scientific journals over time." He specifically mentioned a January 2021 "study that demonstrated the physicochemical adherence and persistence of the SARS-CoV-2, that it—it changes the characteristics of inanimate surfaces when it makes contacts with the virus and its proteins." Counsel asked for the opportunity to make those allegations: "at least one shot at leave to amend" the original complaint.

the contents of any exhibits attached to the complaint. Indeed, the contents of an incorporated document . . . will take precedence over and supersede any inconsistent or contrary allegations set out in the pleading.' " (*Westamerica Bank v. City of Berkeley* (2011) 201 Cal.App.4th 598, 607.)

" 'If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer. "[W]e are not limited to plaintiffs' theory of recovery in testing the sufficiency of their complaint against a demurrer, but instead must determine if the *factual* allegations of the complaint are adequate to state a cause of action under any legal theory . . . ." ' " (*Zhang v. Superior Court*, *supra*, 57 Cal.4th at p. 370, see also *id*. at p. 383.)

With respect to leave to amend, it is Boffo's burden to show in what manner it can amend the complaint and how that amendment will change the legal effect of the pleading. (See *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 513, fn. 3.) Such a showing may be made for the first time on appeal. (*Smith v. BP Lubricants USA Inc.* (2021) 64 Cal.App.5th 138, 144-145.) But when a demurrer to an original complaint has been sustained without leave to amend, the question becomes whether the complaint shows on its face that it is incapable of amendment. (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747 ["[L]eave to amend is properly granted where resolution of . . . legal issues does not foreclose the possibility that the plaintiff may supply necessary factual allegations"].) In such instances, "leave to amend is liberally allowed as a matter of fairness . . . ." (*Ibid*; *JPMorgan Chase Bank, N.A. v. Ward* (2019) 33 Cal.App.5th 678, 684.) " 'Denial of leave to amend is appropriate only when it conclusively appears that there is no possibility of alleging facts under which recovery can be

obtained.' " (*Eghtesad v. State Farm General Insurance Company* (2020) 51 Cal.App.5th 406, 411, 412.)

II. *Insurance Policy Interpretation and the* Inns *Case*

With respect to the attached insurance policy, its interpretation "is a question of law and is reviewed de novo under settled rules of contract interpretation. [Citations.] 'The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the "mutual intention" of the parties. "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. [Citation.] Such intent is to be inferred, if possible, solely from the written provisions of the contract. [Citation.] The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' [citation], controls judicial interpretation." ' " (*Ameron Internat. Corp. v. Insurance Co. of State of Pennsylvania* (2010) 50 Cal.4th 1370, 1377-1378; see also *Yahoo Inc. v. National Union Fire Insurance Company of Pittsburgh, PA* (2022) 14 Cal.5th 58, 67; *Inns*, *supra*, 71 Cal.App.5th at p. 697.)

"An insurance policy provision is ambiguous when it is susceptible of two or more reasonable constructions. [Citation.] If ambiguity exists, however, the courts must construe the provisions in the way the insurer believed the insured understood them at the time the policy was purchased. [Citation.] In addition, if, after the court evaluates the policy's language and context, ambiguities still exist, the court must construe the ambiguous language against the insurer, who wrote the policy and is held ' "responsible" ' for the uncertainty. [Citation.] Particularly, '[i]n the insurance context, . . . ambiguities [are resolved] in favor of coverage' so as to

protect the insured's reasonable expectation of coverage . . . . Insurers have the more difficult burden of proving that the underlying claim *cannot* fall within policy coverage." (*Ameron Internat. Corp. v. Insurance Co. of State of Pennsylvania*, *supra*, 50 Cal.4th at p. 1378.)

Courts examine the policy as a whole and in context to decide whether an ambiguity exists. (*Inns*, *supra*, 71 Cal.5th at p. 698.) Contractual language " 'cannot be found to be ambiguous in the abstract' " and courts should " 'not strain to create an ambiguity where none exists.' " (*Inns*, at p. 698, quoting *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18-19.)

This court applied these principles in *Inns*, *supra*, 71 Cal.App.5th 688, a case Boffo curiously does not mention or discuss in its opening brief.[5] *Inns* involved a lodging facility owner's complaint alleging business losses as a result of COVID-19 government closure orders made " 'in direct response to the continued and increasing presence of the coronavirus on [plaintiff's] property and/or around its premises.' " (*Id.* at pp. 692-693.) The commercial property insurance policy at issue in *Inns* covered "direct physical loss of or damage to covered property at the premises . . . caused by or resulting from any covered cause of loss[.]" (*Id.* at pp. 694-695.) It also contained "business income (and extra expense)" coverage stating that the insurance company would pay "for the actual loss of business income you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration.' " (*Id.* at p. 695.) The policy provided the " 'suspension' must be caused *by direct physical loss of or damage to property at* [*the insured's*] *premises*[.]" (*Ibid.*) The policy additionally contained "civil authority" coverage for lost business income caused by action of civil authority "that prohibits access to

---

5 This court decided *Inns* in November 2021. Boffo filed its opening appellate brief in March 2022.

the . . . premises" due to some *other property* sustaining "direct physical loss of or damage . . . caused by or resulting from any covered cause of loss." (*Ibid*., some capitalization omitted.)

Rejecting the argument that the phrase "direct physical loss of or damage to" was ambiguous (*Inns*, *supra*, 71 Cal.App.5th at p. 700, fn. 14), we held in reviewing the insurer's demurrer that the complaint did not describe a scenario triggering coverage under either the business income or civil authority provisions, and that the insured could not amend the complaint to state a claim for relief. (*Inns*, *supra*, 71 Cal.App.5th at pp. 698, 705-708, 710-712, 713-714.) With respect to the business income coverage, the insured argued that even though COVID-19 did not physically alter the structure of property, it gave rise to "physical damage" by rendering it uninhabitable and unavailable for its intended use. (*Id*. at p. 701.) We rejected its reliance on cases involving subsiding soil beneath an undamaged home, ammonia or asbestos contamination, or poor air quality due to wildfire smoke. (*Id*. at pp. 701-702, 703.)[6] We explained the cases were inapplicable as the insured could not reasonably allege that the presence of COVID-19 on its premises is what *caused* the premises to be uninhabitable or unsuitable for its intended purposes. (*Id*. at p. 703.) That is, the government closure orders showed they were issued because the virus was present *throughout the counties* where the

---

6 Citing *Hughes v. Potomac Ins. Co. of District of Columbia* (1962) 199 Cal.App.2d 239 [soil subsidence]; *Gregory Packaging, Inc. v. Travelers Property Casualty Co. of America* (D.N.J., Nov. 25, 2014, No. 2:12-cv-04418) 2014 WL 6675934 [ammonia release]; *Oregon Shakespeare Festival Association v. Great American Insurance Co.* (D.Or., June 7, 2016, No. 1:15-cv-01932-CL) 2016 WL 3267247, order vacated by agreement (D.Or., Mar. 6, 2017, No. 1:15-cv-01932-CL) 2017 WL 1034203 [wildfire smoke]; *Port Authority of New York and New Jersey v. Affiliated FM Ins. Co.* (3d Cir. 2002) 311 F.3d 226, 236 [asbestos contamination].

insured did business, not because of any particular presence of the virus on its premises, which was consistent with the insured's proximate cause allegations. (*Ibid*.) Further, the insured alleged it ceased its operations "as a direct and proximate result" of the government shut-down orders; it did not allege the particular presence of virus on its premises proximately caused its closure. (*Ibid*.) Thus, there was a "lack of causal connection between the alleged physical presence of the virus on [the insured's] premises and the suspension of [its] operations . . . ." (*Id*. at p. 704.) We adopted the reasoning of a case pointing out that the closure orders demonstrated that the insured's " 'facilities would have had remained [*sic*] shut regardless of whether the virus was present in its facilities.' " (*Id*. at p. 705, quoting *Another Planet Entertainment, LLC v. Vigilant Insurance Co.* (N.D.Cal., Feb. 25, 2021, No. 20-cv-07476-VC) 2021 WL 774141, at p. *2.)[7]

We further rejected the insured's claim that its complaint pleaded suspension of business operations caused by a "direct physical loss of" property; that policyholders could reasonably expect a claim constitutes physical loss where the insured property cannot function as intended. (*Inns*, *supra*, 71 Cal.App.5th at p. 705.) We explained the argument "collapses coverage for 'direct physical loss' into 'loss of use' coverage" and was unsupported by the policy language as a whole as well as case law. (*Ibid*.) "[N]umerous courts have observed [that] the words 'direct' and 'physical' preclude the argument that coverage arises in a situation where the loss

---

7 We nevertheless stated it was possible hypothetically that an invisible airborne agent would cause a policyholder to suspend operations because of direct physical damage to property, but the insured's complaint in *Inns* "does not describe such a circumstance because it bases its allegations on the situation created by the [government closure o]rders, which were not directed at a particular business establishment due to the presence of COVID-19 on that specific business's premises." (*Inns*, *supra*, 71 Cal.App.5th at p. 704.)

incurred by the policyholder stems solely from an inability to use the physical premises to generate income, without any other physical impact to the property." (*Id*. at p. 706.) In our view, the policy's reference to a "period of restoration," which focused on repairing, rebuilding or replacing property, indicated it required physical alteration, not mere loss of use. (*Id*. at p. 707.)

As for the civil authority coverage, we held it did not apply because the closure orders' plain language showed they were not based on direct physical loss of or damage to property of other premises but were issued in an attempt to prevent the spread of the COVID-19 virus. (*Inns*, *supra*, 71 Cal.App.5th at p. 711.) Accordingly, the orders did not give rise to coverage. (*Id*. at p. 712.)

Finally, we held the trial court properly sustained the insurer's demurrer without leave to amend, even in the face of the insured's contention that it could include more scientific information about the pandemic. (*Inns*, *supra*, 71 Cal.App.5th at p. 713.) Though the insured did not explain what information it would include, we observed plaintiffs in other cases sought to allege COVID-19 would attach, adhere, and convert surfaces or materials so as to make a physical change in the affected area. (*Ibid*., citing in part *Menominee Indian Tribe of Wisconsin v. Lexington Ins. Co.* (N.D.Cal. 2021) 556 F.Supp.3d 1084, 1101.) This was not enough: "Even were Inns to amend its complaint to include specific allegations about how the virus is transmitted and how it can persist on surfaces and in the air, the complaint still would not state a claim for relief under either the business income or civil authority coverage provisions. As we have explained, with respect to the policy's business income coverage, the scenario pled in the complaint does not state a claim because (1) Inns' suspension of operations was caused by the orders, not by any physical damage to property, and (2) mere loss of use of real property to generate income does not give rise to coverage. Additional

allegations about the science behind the pandemic would not change that analysis. With respect to the civil authority coverage, specific scientific information would not solve the fundamental problem that the orders were issued to prevent the spread of the virus rather than due to any 'direct physical loss of or damage to property.' " (*Inns*, at p. 713, some capitalization omitted.)

III. *Boffo's Complaint Does Not State a Cause of Action for Coverage Under the Policy's Business Income or Civil Authority Provisions*

As in *Inns*, this case involves Boffo's claim of coverage under a property insurance policy having both lost business income and civil authority provisions requiring suspension of business operations or prevention of access be "due to direct physical loss of or damage to" either the insured's or some other property. And while the appellate record does not contain Fireman's Fund's request for judicial notice attaching the government closure orders on which Boffo relied, the trial court judicially noticed them, and Boffo did not challenge the proposition advanced by Fireman's Fund below that they were issued to slow or prevent the spread of the virus, not that they were issued "due to direct physical loss of or damage to" any property.[8] Thus, *Inns* guides

---

8 Fireman's Fund in its demurrer argued the government shut-down orders "were issued to protect public health and safety and to mitigate the strain on the state's healthcare systems by slowing the spread of COVID-19," and did not identify any direct physical loss of or damage to property near the theaters. In opposition, Boffo did not contest that assertion regarding the underlying intent of the orders, and acknowledged generally the governmental actions were "taken in response to the spread and impact of COVID-19 . . . ." The specific orders and where they may be found are:

1. March 16, 2020 Amended Order of the Health Officer of San Diego County and Emergency Regulations at <https://www.sandiegocounty.gov/content/sdc/hhsa/programs/phs/community_epidemiology/dc/2019-nCoV/health-order.html>;

our analysis, and as we explain, it compels the same conclusion with regard to Boffo's causes of action to the extent they are based on these provisions.[9]

---

2. March 16, 2020 Order of the Health Officer of the County of Contra Costa at <https://www.contracosta.ca.gov/7793/COVID-19-Timeline>;

3. March 18, 2020 Amended Public Health Order, issued by the Orange County Health Officer at <https://www.yorbalindaca.gov/DocumentCenter/View/4516/EOC-Press-Release-Amended-Order-31820-PDF?bidId=>;

4. March 19, 2020 Executive Order N-33-20, issued by the Governor of California at <https://www.gov.ca.gov/2020/03/19/governor-gavin-newsom-issues-stay-at-home-order/>; and

5. March 29, 2020 Order of the San Diego County Public Health Officer at <https://www.sandiegocounty.gov/content/sdc/hhsa/programs/phs/community_epidemiology/dc/2019-nCoV/health-order.html>.

9 In addition to citing numerous other federal and out-of-state authorities that do not bind us (*People v. Troyer* (2011) 51 Cal.4th 599, 610 [California courts are not bound by out-of-state authorities]; *People v. Williams* (2013) 56 Cal.4th 630, 668 [federal court of appeal decisions are not binding on California courts]), Boffo asks this court to take judicial notice of two minute orders issued after the judgment in this case: the February 2022 minute order of the United States District Court of the Central District of California on a defendant's motion for partial judgment on the pleadings in *Live Nation Entertainment, Inc. v. Factory Mutual Insurance Company* (C.D.Cal., Feb. 3, 2022, No. CV21-00862) 2022 WL 390712 and an Orange County Superior Court September 2021 minute order overruling Fireman's Fund's demurrer to an amended complaint in *Hotel Adventures, LLC v. Fireman's Fund Ins. Co.* (Sept. 23, 2012, No. 30-2021-01188889). Boffo asserts these courts recognize that COVID-19 may cause physical damage to property, and also address insurance coverage for COVID-19 under specific extra coverages, including those for "communicable disease" similar to the policy in this case. Even if we were to grant the request, the minute orders do not persuade us to change the conclusions we reach here based on *Inns*, and they are unnecessary on the issues presented on the so-called extra coverages (crisis management and event cancellation), as to which we hold the trial court should have granted Boffo leave to amend.

A. *The Policy Provisions*

With specifically defined bolded terms, the policy's business income and extra expense coverage form provides: "We will pay for the actual loss of business income you sustain due to the necessary suspension of your operations during the period of restoration. The suspension must be caused by direct physical loss of or damage to property at the premises described in the declarations . . . ."[10] (Bold and some capitalization omitted.) The policy contains additional coverage for "extra expense" defined as "necessary expenses you incur during the period of restoration that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a covered cause of loss." (Bold and some capitalization omitted.)

The policy's business access/civil authority coverage endorsement provides: "We will pay for the actual loss of business income you sustain and necessary extra expense you incur caused by action of civil authority that prohibits access to the described premises . . . due to the direct physical loss of or damage to property, other than at the described premises, caused by or resulting from a covered cause of loss." A subprovision for "access to premises" provides: "We will pay for the actual loss of business income you sustain and necessary extra expense you incur caused by the physical prevention or hindrance of ingress to or egress from the described premises . . . above due to the direct physical loss of or damage to property, other than at

---

10 "Period of restoration" is defined as the period of time that "[b]egins with the date of direct physical loss or damage caused by or resulting from any covered cause of loss at the described premises" and "[e]nds on the date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality." (Some capitalization omitted.)

the described premises, caused by or resulting from a covered cause of loss."[11] (Some capitalization omitted.)

B. *Boffo Cannot Allege a Scenario Triggering Policy Coverage for "Direct Physical Loss of or Damage to Property" Either at the Premises or on Other Property*

Boffo contends that interpreting the policy in the light most favorable to it should compel us to conclude its losses are covered: "that the presence of COVID-19 at its properties constitutes a 'direct physical loss of or damage' to property." It focuses on the phrase "direct physical loss *of* . . . property," arguing that dispossession or deprivation of use of its properties qualifies as a form of loss so as to trigger coverage under case law, including *Kingray Inc. v. Farmers Group Inc.* (C.D.Cal. 2021) 523 F.Supp.3d 1163 and like cases.

But as we have summarized above, *Inns* rejected the argument that loss of use was a scenario that triggered coverage. (*Inns*, *supra*, 71 Cal.App.5th at p. 705 & fn. 18 ["[A]lthough the dictionary definition of 'loss' could encompass the mere loss of use of real property, the surrounding context of the word 'loss' in the Policy unambiguously indicates that 'direct physical loss of' property cannot reasonably be interpreted to have that meaning"]; accord, *Mudpie, Inc. v. Travelers Casualty Insurance Company of America* (9th Cir. 2021) 15 F.4th 885, 892 [declining to interpret "direct physical loss of or damage to" as synonymous with loss of use].) And as in *Inns*, the business income policy provision here includes a "period of

---

11 As to a covered cause of loss, the policy refers to a form that addresses basic and special causes of loss. That form provides coverage for "basic causes of loss" not applicable here (i.e., fire, lightning, windstorm, smoke, riots, etc.) as well as "risks of direct physical loss not covered by the basic causes of loss" unless the loss falls within certain exclusions or limitations. (Some capitalization omitted.)

restoration" clause, supporting the conclusion that mere loss of use without any other physical impact to the property is insufficient to trigger coverage. (Accord, *id*. at pp. 706-707; see also *Mudpie, Inc.*, at p. 892 [holding an interpretation providing coverage absent physical damage "would render the 'period of restoration' clause [in the insurance policy] superfluous"].)

Like the insured in *Inns*, Boffo also relies on *Hughes v. Potomac Insurance Co. of District of Columbia*, *supra*, 199 Cal.App.2d 239 involving soil subsidence and like cases to support its loss of use argument. But as stated, we held those cases were inapplicable, contrasting them with the situation created by the shut-down orders involved here: " '[T]he presence of COVID-19 on Plaintiff's property did not cause damage to the property necessitating rehabilitation or restoration efforts similar to those required to abate asbestos or remove poisonous fumes which permeate property. Instead, all that is required for Plaintiff to return to full working order is for the [government orders and restrictions to be lifted].' " (*Inns*, *supra*, 71 Cal.App.5th at p. 704; see also *ibid*. [it is the " 'general presence [of an invisible virus present throughout the world] and not a specific physical harm to covered properties, that has caused governments at all levels to consider restrictions. The question, therefore, is one of "widespread economic loss due to the restrictions on human activities, not the consequence of a direct physical loss or damage to the insured premises" ' "], quoting *Associates in Periodontics, PLC v. Cincinnati Insurance Co.* (D.Vt. 2021) 540 F.Supp.3d 441, 448; accord, *Mudpie, Inc. v. Travelers Casualty Insurance Company of America*, *supra*, 15 F.4th at pp. 891-892 [distinguishing *Hughes* and pointing out it "did not imply that an insured need not show any actual physical change to the insured property to prove 'direct physical loss' "].)

In its reply brief, Boffo argues that in *Inns*, we recognized certain allegations may be sufficient to allege property damage from the presence of COVID-19, and asserts it seeks leave to amend to allege the presence of the virus resulted in the complete closing of its business at least twice. It points to our reliance on an example expressed by the district court in *Another Planet Entertainment, LLC v. Vigilant Insurance Co.*, *supra*, 2021 WL 774141, which suggested a complaint could be adequate if an otherwise operating business had to shut down because of the presence of the virus within the facility, as a restaurant might have to do if kitchen personnel tested positive, requiring the facility to be emptied for sanitation. (*Inns*, *supra*, 71 Cal.App.5th at pp. 704-705, quoting *Another Planet*, at p. *2.) Boffo, however, omits the district court's point immediately following that observation: " 'Perhaps [in that scenario] the restaurant could successfully allege that the virus created physical loss or damage in the same way some chemical contaminant might have. *But as the complaint and closure orders demonstrate . . .* , [*the plaintiff's*] *facilities would have had remained* [*sic*] *shut regardless of whether the virus was present in its facilities*.' " (*Inns*, at p. 705, italics added.) The district court in *Another Planet* found it "unassailable" that the losses of a business subject to a generally applicable closure order are by definition not caused by the presence of the virus at the facility. (*Another Planet*, at p. *2, fn. 1.) Thus, in *Inns*, we held that despite the insured's allegation that the COVID-19 virus was present on its premises, it "has not identified any direct physical damage to property that caused it to suspend its operations." (*Ibid.*) The same conclusion follows here.

C. *Leave to Amend*

We are unconvinced that Boffo can allege facts implicating a scenario triggering coverage under the business income and civil authority provisions

of its policy. Boffo points out it sought leave to amend to "further refine" its complaint's allegations "based on the dynamic and ever-changing science behind COVID-19 and its effects on air space and on property." It asserts: "Recent science has shown that infected individuals shed viral particles by discharging infectious respiratory droplets that can remain in the air for hours. These droplets containing COVID-19 fall and tangibly affect the surfaces of the Properties. Once attached to the surface, they can exist for up to 28 days and have been detected even after the surface is sanitized." These allegations are not materially different than those we found insufficient in *Inns*, which pleaded that COVID-19 attached and adhered to surfaces, "converting" them and representing a physical change. (*Inns*, *supra*, 71 Cal.App.5th at p. 713.) Thus, as in *Inns*, we conclude Boffo cannot allege a scenario triggering coverage under either the business income or civil authority provisions of the policy.

We recognize that since we decided *Inns*, *supra,* 71 Cal.App.5th 688, the Second District, Division Seven Court of Appeal in *Marina Pacific*, *supra*, 81 Cal.App.5th 96 concluded insureds adequately alleged direct physical loss or damage to covered property by COVID-19 sufficient to state a breach of contract cause of action against Fireman's Fund. (*Id*. at p. 108.) That policy contained both business interruption and "communicable disease" coverage, indicating Fireman's Fund would pay for lost business income due to necessary suspension of operation during the period of restoration arising from "direct physical loss or damage" to covered property, including such losses or damage caused by or resulting from a covered communicable disease event. (*Id*. at pp. 99-100.) In *Marina Pacific*, the insureds alleged COVID-19 bonds to surfaces through physiochemical reactions and transformed the physical condition of the property, and as a "direct result" of the virus being

"continually reintroduced to surfaces at [its] locations" they were required to close or suspend operations in whole or in part and incurred extra expense as they adopted measures to restore and remediate the air and surfaces at the insured properties. (*Id*. at pp. 108-109.) The insureds alleged they were required to dispose of property damaged by COVID-19 and limit operations at their properties. (*Id*. at p. 109.) The Court of Appeal held that even if improbable, and absent judicially-noticed facts irrefutably contradicting them, the allegations unquestionably pleaded direct physical loss or damage to covered property, that is, a distinct, demonstrable, physical alteration of the property sufficient to overcome Fireman's Fund's demurrer. (*Ibid*.)

Marina Pacific acknowledged its conclusion was "at odds with almost all (but not all) decisions" considering business losses from the pandemic under first person commercial property insurance. (*Marina Pacific*, *supra*, 81 Cal.App.5th at p. 788.) It also distinguished *Inns, supra,* 71 Cal.App.5th 688 as involving allegations based on the situation created by the government shut-down orders, which were not directed at a particular business establishment due to the presence of COVID-19 on that business's premises. (*Marina Pacific*, at p. 110, fn. 12.) And *Marina Pacific* did not involve claims of temporary lost use, as in *Inns* and this case. (*Id*. at p. 111, fn. 13 ["The insured in this case made no such claim of temporary loss of use of property due to pandemic-related closure orders"].) *Marina Pacific* does not change our conclusions about the insufficiency of Boffo's allegations seeking to trigger business income and civil authority coverage in this case.

IV. *Crisis Management Coverage*

We reach different conclusions with respect to the other policy provisions Boffo relies upon in its complaint. Though as presently styled the complaint does not plead scenarios triggering coverage under these

provisions, it does not conclusively show it is incapable of amendment. As we explain, the trial court should have granted Boffo leave to amend to attempt to state a cause of action for coverage under them.

The crisis management coverage endorsement provides in part: "We will pay for the actual loss of crisis event business income you sustain due to the necessary suspension of your operations during the crisis event period of restoration. The suspension must be caused by or result from a covered crisis event at your covered premises." The policy defines a "[c]overed crisis event" as including "[p]remises contamination," which is "[n]ecessary closure of your covered premises due to any sudden, accidental and unintentional contamination or impairment of the covered premises or other property on the covered premises which results in clear, identifiable, internal or external visible symptoms of bodily injury, illness, or death of any person(s). This includes covered premises contaminated by communicable disease, Legionnaires' disease, but does not include premises contaminated by other pollutants or fungi." (Bold omitted.)

Boffo contends the complaint adequately states coverage under this endorsement by allegations that its properties were contaminated by COVID-19, and the court erred by sustaining Fireman's Fund's demurrer without addressing this coverage. Specifically, Boffo maintains crisis management coverage is triggered by allegations that COVID-19 is a deadly virus easily transmitted between individuals; COVID-19 physically and directly infects and stays on surfaces for up to 28 days; as a result of COVID-19 contamination it was forced to shut down; presence of COVID-19 contamination is a covered crisis event; and COVID-19 and the government shut-down orders resulted in substantial loss of business income and additional expenses "expressly covered" by the policy.

Characterizing some of these allegations as "vague," Fireman's Fund responds that Boffo has not demonstrated it is entitled to this coverage, as it "never alleges that any of its theaters were required to close due to the 'sudden, accidental, and unintentional contamination or impairment' of those theaters; nor that such contamination or impairment of its premises resulted in internal or external visible symptoms of bodily injury, illness, or death of any person(s)." Fireman's Fund further argues Boffo "never alleged that the 'necessary closure' of its specific premises was linked to the specific contamination that resulted in bodily injury, illness, or death."

Fireman's Fund's arguments have merit. We cannot agree with Boffo that the complaint, as presently styled, states coverage under the policy's crisis management provision. The above-cited allegations are unspecific and conclusory, and do not allege a sufficient *factual* causation scenario, namely suspension or closure due to "sudden, accidental, *and* unintentional" COVID-19 contamination on the premises or property on the premises resulting in any person's "clear, identifiable, internal or external visible symptoms of bodily injury, illness, or death . . . ." (Italics added.)

This conclusion, however, does not require us to affirm the judgment. During oral argument at the hearing on the demurrer, Boffo's counsel pointed out that liberality in granting leave to amend was greater with an original complaint, and counsel sought at least one opportunity to amend. " 'A demurrer should not be sustained without leave to amend if the complaint, liberally construed, can state a cause of action under any theory or if there is a reasonable possibility the defect can be cured by amendment.' " (*Cabral v. Soares* (2007) 157 Cal.App.4th 1234, 1240-1241; see also *Tarrar Enterprises, Inc. v. Associated Indemnity Corp.* (2022) 83 Cal.App.5th 685, 701.) Because the trial court did not give Boffo an opportunity to amend its first pleading,

the inquiry as we have summarized above becomes whether the complaint on its face shows it is incapable of amendment. (*City of Stockton v. Superior Court*, *supra*, 42 Cal.4th at p. 747.) " '[F]or an original complaint, regardless whether the plaintiff has requested leave to amend, it has long been the rule that a trial court's denial of leave to amend constitutes an abuse of discretion unless the complaint "shows on its face that it is incapable of amendment." ' " (*Tarrar Enterprises, Inc.*, at p. 688, quoting *Eghtesad v. State Farm General Insurance. Co.*, *supra*, 51 Cal.App.5th at pp. 411-412; see also *Cabral*, at p. 1240 ["Only rarely should a demurrer to an initial complaint be sustained without leave to amend"]; compare *Apple Annie, LLC v Oregon Mutual Insurance Company* (2022) 82 Cal.App.5th 919, 937 [for the first time in supplemental appellate briefing plaintiff sought leave to amend and at oral argument counsel advised the court "he could not 'tell [us] what [he] would allege as an amendment' "; this concession and age of the case compelled appellate court to conclude plaintiff did not meet its burden to obtain leave to amend].) Stated another way, we ask whether it "appears 'conclusively' that it is impossible [for the complaint] to allege such facts." (*Amy's Kitchen, Inc. v. Fireman's Fund Insurance Company* (2022) 83 Cal.App.5th 1062, 1073, quoting *Cabral*, at p. 1240.)

Coverage under the crisis management endorsement does not turn on whether Boffo can allege direct physical loss of or damage to its property. Though the trial court additionally ruled the complaint lacked specific allegations regarding "viral contamination in any of [Boffo's] locations," we cannot say conclusively it appears impossible for Boffo to make out a factual scenario sufficient to trigger coverage. As to this theory of coverage, the court should have given Boffo an opportunity to amend its complaint to attempt to do so.

V. *Event Cancellation and Postponement Expense Reimbursement*

We reach the same conclusion with respect to Boffo's ability to allege coverage under the policy's event cancellation and postponement expense reimbursement endorsement. That endorsement provides: "We will cover: [¶] 1. The non-refundable expenses, (less revenue already generated from the covered special event), you have incurred in connection with a covered special event at a scheduled location as shown in the declarations that applies to this policy, if it must be cancelled or postponed as a result of one of the following: [¶] . . . [¶] b. Acts of civil authority that prevent access to the described premises." The policy provides that a "covered special event means weddings, bat mitzvah, bar mitzvah, private or corporate parties, and charity fundraising events [but not] professional golf events or events with a duration longer than 3 consecutive days." (Bold and some capitalization omitted.)

Boffo contends its complaint's allegations sufficiently triggered coverage under the event cancellation and postponement expense reimbursement endorsement such that the court erred by sustaining Fireman's Fund's demurrer without leave to amend. It points to allegations that its losses resulting from COVID-19 and the government shut-down orders "triggered coverage" under the provision or "forced event cancellations at [its] properties."

Fireman's Fund responds that the complaint does not allege Boffo suffered any nonrefundable expenses stemming from cancellation of any "covered special event" as defined in the policy. It argues: "Although [Boffo] generally alleged that it had to cancel events as a result of government stay-at-home orders . . . Boffo never alleged facts showing that any cancelled events were covered special events or that it suffered anything except for lost

anticipated revenue." It asserts that "[b]y definition, that is not sufficient to trigger coverage." (Some capitalization omitted.)

Again, we disagree with Boffo that the complaint, as presently drafted, sufficiently alleges coverage under the event cancellation and postponement expense reimbursement endorsement. The allegation that Boffo's losses triggered coverage is a mere conclusion that we disregard in assessing the complaint's adequacy. The allegation that COVID-19 or the government shut-down orders forced event cancellations at its properties is too vague to demonstrate the provision—which enumerates certain special events—applies.

But, as with the crisis management provision, those conclusions do not end the inquiry because coverage under this provision does not turn on whether Boffo can allege direct physical loss of or damage to its property. In short, the trial court erred by denying Boffo leave to amend to attempt to state a cause of action for coverage under this provision.

DISPOSITION

The judgment is reversed and the trial court directed to vacate its order sustaining Fireman's Fund's demurrer without leave to amend and enter a new order sustaining the demurrer with leave to amend consistent with this opinion. The parties shall bear their own costs on appeal.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

DO, J.